No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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TERRY L. TERRY,

*Petitioner*,

*versus*

TIM HOOPER, *WARDEN, LOUISIANA STATE PENITENTIARY*,

*Respondent*.

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On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Did the state court unreasonably apply *Jackson v. Virginia* when it determined that evidence presented at trial was sufficient to sustain Terry's conviction on count three (molestation of victim S.B.) where the victim testified that it was her father, Jonathan, and not the Petitioner Terry who touched her and where the victim's description of the contact—painless pinching and squeezing—fails to meet the Louisiana statutory definition of molestation?

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *Terry v. Hooper*, 85 F.4th 750 (5th Cir. 2023) and is set forth at App. 001.

## JURISDICTION

The judgment of the court of appeals was entered on October 31, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 28, Section 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Under Louisiana law, molestation was defined as:

> Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile.

LA REV. STAT. § 14:81.2(A) (2008).

## STATEMENT OF THE CASE

This case involves allegations that the Petitioner Terry L. Terry molested three minor females. Two of the allegations, counts one and two, concerned Terry's two

biological daughters and occurred decades prior to the charges being brought in 2008. Counts one and two were supported by the testimony of each biological daughter, who were adults by the time of trial, as well as evidence that Terry had, decades earlier, confessed to the molestations to investigators, other family members, and during juvenile court proceedings.

But count three lacked any of that evidence. Count three concerned an allegation that in 2008, Terry molested his four-year-old great niece who was living with Terry and Terry's wife Jennifer. For count three, there was no confession and the victim identified someone other than Terry as the person who touched her. This case is about count three.

## I. Record evidence for counts one and two (alleged molestation of A.T.L. & T.T.C.)—not challenged in this appeal

At trial, evidence was introduced that Terry molested his two biological daughters, A.T.L. and T.T.C., in the late 1980s and early 1990s. A.T.L., by then 30 years old, testified at trial that when she was a child, Terry fondled her underneath her clothes, had her stimulate his penis in the shower, and that she engaged in oral sex with him. ROA.1036-48. A.T.L. testified that these events happened prior to her freshman year in high school. ROA.1038. A.T.L.'s mother, Terry's ex-wife, testified that A.T.L. reported the abuse to her in 1993 or 1994. ROA.1216. A.T.L.'s brother, S.T., also testified that Terry admitted to him that he molested A.T.L. ROA.1242-43, 3359.

T.T.C., by then 24 years old, testified at trial that when she was a child, she was naked getting ready for a bath when Terry kissed her in a "sensual" way, without

tongue, but in a way that she felt was wrong and that he might have touched her because she remembers a sensation in her vaginal area but did not know for sure if she was touched. ROA.1140-44.

Linda Isaac with the Department of Children and Family Services testified that in 1993 she interviewed A.T.L. and T.T.C. about the abuse. Ms. Isaac also interviewed Terry in 1993 who became emotional and admitted to molesting A.T.L. and agreed to go to counseling. ROA.1181.

## II. Record evidence for count three (alleged molestation of S.B.)

Count three concerned allegations that Terry molested four-year-old S.B. who was the daughter of Terry's nephew. This is the count challenged in this appeal.

### A. Testimony of investigators

Dorothy Brooks, an investigator with the Caddo Parish Sheriff's Office testified that she handled this investigation and that it started when Terry's adult daughter, A.T.L. called and made a complaint that her father, Terry, had molested her decades earlier when she was a child and that she was making the complaint now because she learned her father was raising someone else's children. ROA.3352. Brooks then opened an investigation and upon learning that Terry had children in his custody arranged for the Gingerbread House interviews of the children. ROA.3402. Terry voluntarily returned from out of state where he was working and turned himself in when he learned of the charges. ROA.3375-76. Ms. Brooks testified that Terry never made any statements to her about the allegations of molesting S.B. ROA.3366.

Jales Washington, a child protection investigator testified that she spoke with Terry during the investigation and Terry informed him that he and his wife had custody of S.B. because her parents were unable to care for her and that they wanted to adopt S.B. and her siblings. ROA.3321-23. Terry later left a voicemail for Ms. Washington where he told her that he had not molested anyone, which Ms. Washington found odd because she believed she had only told Terry there were allegations of abuse and neglect, not molestation. ROA.3324-25. Ms. Washington testified that she thought this was a "valid case" after speaking with Dr. Springer. ROA.3327.

Crystal Clark, the forensic interviewer from Gingerbread House who interviewed S.B., also testified at trial. ROA.3269. She acknowledged that S.B. named each member of her family as "Terry Terry Terry" which Ms. Clark acknowledged she did not believe to be true. ROA.3293. Ms. Clark also interviewed S.B.'s two siblings, N.B. and J.B. ROA.3284, 3294-95. Neither N.B. nor J.B. disclosed any abuse to Ms. Clark.

### B. The Gingerbread interview of S.B.

Six-year-old S.B. testified at trial. ROA.3208. At the outset of her testimony, a video of her previous two Gingerbread interviews were played. ROA.3212-13. The Gingerbread interviews were conducted on June 19 and 20, 2008 when S.B. was four years old. During the interview, S.B. calls everyone by the name "Terry Terry Terry" and fails to identify the Petitioner—Appellant Terry as someone who touched her.

On the Gingerbread video, S.B. is asked to say her mom's name and she says, "Terry Terry Terry." ROA.2572.[1] When asked her daddy's name she repeats, "Terry Terry Terry." ROA.2572. When asked her little brother J.B.'s name she repeats, "Terry Terry Terry." ROA.2572. She gives the same answer, "Terry Terry Terry" when asked her other brother N.B.'s name. ROA.2573. So S.B. referred to all her family members as "Terry Terry Terry."

On the Gingerbread video, S.B. identifies body parts on a diagram and correctly used the word "vagina" to describe that body part and said that's the word her mother uses. ROA.2579-80. When asked if anyone ever touched her vagina before, S.B. says "no." ROA.2580.

When asked if anyone ever touched her butt before the following exchange occurred:

| | |
|---|---|
| **Interviewer:** | Has anybody ever touched you on your butt before? |
| **S.B.:** | (Nods head.) |
| **Interviewer:** | Somebody has touched you on your butt? Who's touched you on your butt? |
| **S.B.:** | My daddy. |
| **Interviewer:** | Your daddy? What's his name? |
| **S.B.:** | Terry Terry Terry. |
| **Interviewer:** | Terry Terry Terry? |
| **S.B.:** | Yeah. |
| **Interviewer:** | Terry Terry. And when your daddy touched you on your butt, what did he use? |
| **S.B.:** | His hand. |
| **Interviewer:** | His hand. Did he touch you on top of your clothes or under your clothes? |
| **S.B.:** | Under. |
| **Interviewer:** | Under your clothes? Okay. And when he touched you on your butt under your clothes, what did he do? |
| **S.B.:** | Squeezed. |

[1] S.B., at a later time on the Gingerbread video, identifies her mother as "Michelle," when asked who brought her to the interview.

| | |
|---|---|
| **Interviewer:** | He squeezed your butt? Okay. |
| **S.B.:** | And pinched. |
| **Interviewer:** | He squeezed and pinched your butt? Okay. What was happening before your dad did that? |
| **S.B.:** | Umm. |
| **Interviewer:** | Do you remember what you were doing before your dad did that? |
| **S.B.:** | (Nods head.) |
| **Interviewer:** | What were you doing? |
| **S.B.:** | Sleeping. |

ROA.2580-81. S.B. went on to say that her dad woke her up and said, "I love you." The interviewer then focused S.B.'s attention on the vagina on the diagram and asked, "what about this part of the body" to which S.B. says, "he squeezes me too" and "he squeezed me and pinches me right there." ROA.2584. The interviewer asked S.B., "when your dad squeezes you or pinches you on your vagina, does it hurt" to which S.B. says no. ROA.2584.

S.B. was asked who was at the house with her when her dad touched her with his hand and she responded, "daddy and momma." ROA.2587. When asked her mom's name she responded, "Terry, Terry, Terry." ROA.2587. When asked who else she had told about her dad touching her, S.B. told the interviewer that she also told her "daddy" whose name was "Terry Terry Terry." ROA.2588-89. At the conclusion of the interview, the interviewer attempts to get S.B. to acknowledge the difference between the truth and a lie, but S.B. does not go along with the prompt and the interview ends. ROA.2590-91.

At trial, when S.B. was played the Gingerbread videos and was asked if everything she said in the video's was the truth she answered, "yes." ROA.3213-14.

### C. Testimony of S.B.

At trial, S.B., who was now six years old, was asked the names of her various family members. She confirmed that on the Gingerbread video she referred to everyone as "Terry Terry Terry." ROA.3217. She then referred to her daddy's name as "*Jonathan* Terry Terry Terry," her mother's name as "Terry Terry Terry" and her mom and dad's names as "Michelle and Jonathan." ROA.3217-18 (emphasis added).

When asked more specifically about the touching incident, S.B. testified that "Terry Terry Terry" were Michelle and Jonathan, her mom and dad. ROA.3222. S.B. said that she was living with Michelle and Jonathan at a trailer. ROA.3223. S.B. then testified that when she said "Terry Terry Terry" was her daddy on the Gingerbread video, she was talking about Jonathan (her biological father). ROA.3223. Then the following exchange occurred:

> **Counsel:** And, [S.B.], I want to be correct with you right now, that when you said Terry Terry Terry was your mother, you were talking about Michelle?
> **S.B.:** Yes, sir.
> **Counsel:** And when you said Terry Terry Terry was your father, you meant Jonathan.
> **S.B.:** Yes, sir.

ROA.3223. In this exchange, S.B. clearly identifies her biological father Jonathan, and not the Petitioner—Appellant Terry, as the person who touched her. Later in her testimony, S.B. was asked again who "Terry Terry Terry" was and she said, "my. . .daddy's brother" whom she claimed to have never lived with. ROA.3225. S.B. then, again, identified her father Jonathan as the person who touched her:

**Counsel:** You said in your video that Terry Terry Terry was doing certain things to you. Do you remember saying that in your videos?
**S.B.:** Yes.
**Counsel:** Now, who do you mean when you said "Terry Terry Terry"?
**S.B.:** Jonathan.
**Counsel:** That's your daddy.
**S.B.:** Yeah.

ROA.3225. The Petitioner—Appellant's name is Terry Lynn Terry and S.B.'s father's name is Jonathan Barger.

### D. Testimony of Dr. Ann Springer

Dr. Ann Springer, a pediatrician with LSU Health Sciences Center testified that she examined S.B. ROA.3421. Dr. Springer testified that she had previously been sued for malpractice because of her testimony as an expert witness on child abuse but believes she was cleared of wrongdoing. ROA.3408. Dr. Springer also acknowledged that she made an incorrected diagnosis in an earlier child sexual abuse case but discovered her error a few days before the trial. ROA.3409. Dr. Springer also testified that she had previously been rejected as an expert in child abuse medicine by a court, perhaps more than ten times. ROA.3412. Despite being rejected by numerous other courts, Dr. Springer was accepted by the district court in this trial as an expert in pediatrics with a special emphasis in child abuse medicine. ROA.3413.

Dr. Springer testified that before examining S.B. she was told that the child had disclosed that someone pinched and squeezed her vagina and behind. ROA.3422. In her exam of S.B. found chronic redness and irritation of the vulva and labia, secondary to poor hygiene, chronic yeast infection, and tissue separate of the hymen that was consistent with sexual abuse and digital penetration. ROA.3422-24.

### E. Testimony of S.B.'s biological parents, Michelle and Jonathan Barger

Michelle Barger testified that S.B. was her daughter and Terry was her husband's uncle. ROA.3235. She testified that she gave custody of S.B. and S.B.'s brother over to Terry and his wife Jennifer because Jonathan was working away from home and she had a nervous breakdown and could not adequately care for the kids anymore. ROA.3238, 3262.

Ms. Barger testified that she did not believe that Terry ever molested S.B. and that S.B. was just telling kid stories. ROA.3240, 3242. S.B. had an active imagination and had make believe friends. ROA.3264. She testified that neither she, nor her daughter S.B. used the word "vagina" to describe their female reproductive area. ROA.3260-61. Ms. Barger claimed that S.B. used the term "tulip" to refer to her vagina. ROA.3260-61. She also testified that Terry's wife, Jennifer, was always home with S.B. ROA.3259.

She testified that after learning that Dr. Springer believed there were tears in S.B.'s hymen that she brought S.B. to two additional doctors, Dr. Lococo and Dr. Taylor, in Vivian, Louisiana who both refuted Dr. Springer's opinion. ROA.3241.

Jonathan Barger testified that he doesn't believe Terry molested his daughter, S.B. ROA.3307. He acknowledged that when he learned of Dr. Springer's finding of possible tears in his daughter S.B.'s hymen he was angry at Terry, but that he turned his anger toward the investigators when his wife brought S.B. to two family doctors, Drs. Lococo and Taylor, who did not find evidence of hymen tears. ROA.3308. Mr. Barger believed Dr. Lococo and Dr. Taylor over Dr. Springer because the two family

doctors had been S.B.'s doctors all her life and Mr. Barger believed Dr. Springer had been caught lying before. ROA.3313-14. Neither Dr. Lococo nor Dr. Taylor testified at trial.

### F. Testimony of other members of Terry's household

Terry's wife, Jennifer Terry, testified that she is married to Terry and that the two of them helped raise S.B. and her siblings. ROA.3449. They took custody of the children because they discovered the kids and their mother Michelle living in a muffler shop and offered to let them stay with her. Michelle, instead, asked Jennifer and Terry if they would take just the kids, which they agreed to get the kids out of a bad situation. ROA.3472-73. Another witness testified that the state was about to take away the kids from Michelle at that point. ROA.3489.

Jennifer also testified that during the time that they raised S.B. and her siblings, several other people periodically lived in the house. with them including (1) Terry's sister Donna Terry Brandy, (2) Terry's then-adult son S.T., and Terry's niece Amber Katine and her three kids. ROA.3449. None of those people ever witnessed anything inappropriate with Terry or accused Terry of ever being inappropriate. ROA.3457.

Jennifer explained that she did not work so she was always home with the children, including S.B. ROA.3455. Jennifer was the one who bathed and cared for the children each day. ROA.3458. Jennifer testified that nobody ever went into S.B.'s room and nobody could have molested her in her bed or the bathroom without

Jennifer knowing. ROA.3455. Jennifer testified that Dr. Lococo is who would see the children when they were sick or had check-ups. ROA.3459.

Terry's mother Wilma Terry testified that Terry and Jennifer's house was always clean and neat and that they took good care of S.B. and her siblings. ROA.3441. Donna Terry Brandy testified that she lived with Jennifer and Terry for the majority of the time they raised S.B. and never saw anything inappropriate happen or saw any indication that S.B. was neglected or abused. ROA.3493, 3495-96. Ms. Brandy also testified that she doesn't believe Terry was ever alone with S.B. since Terry worked long hours as an electrician and Jennifer was always there. ROA.3501.

Finally, Lena Marie Henry testified that she was previously in a long-term relationship with Terry and the two lived together, with her two children, for five years and Terry never did anything inappropriate. ROA.3538, 3542-43. Ms. Henry even asked her daughter if Terry ever anything inappropriate with her when Ms. Henry learned of the allegations and her daughter said no. ROA.3541. Ms. Henry's daughter, who by then an adult, also testified that Terry never touched her inappropriately. ROA.3545, 3548.

### G. Terry's trial testimony

Terry testified in his own defense at trial. He denied ever molesting or sexually abusing S.B. ROA.3582, 3608. No evidence was introduced that Terry ever confessed or made any statements to investigators or third parties concerning molesting or sexually abusing S.B.

## III. Procedural background

### A. Exhaustion of the sufficiency of evidence on count three claim in state court

On December 9, 2010, a jury returned a guilty verdict as to all three counts of molestation of a juvenile in violation of LA REV. STAT. § 14:81.2. ROA.2712-15. Terry received concurrent sentences of 15 years (count one), 15 years (count two), and 50 years hard labor, 25 years without benefit of probation, parole, or suspension of sentence (count three), respectively. ROA.3716.

Terry appealed his conviction to the Court of Appeal, Second Circuit, State of Louisiana which affirmed his conviction on November 21, 2012. ROA.143-89; *State v. Terry*, 47,425 (La. App. 2 Cir. 11/21/12), 108 So. 3d 126, *writ denied*, 2012-2759 (La. 6/28/13), 118 So. 3d 1096. Relevant here, in his direct appeal Terry challenged the sufficiency of the evidence as to count three, the alleged molestation of S.B.:

> Defense counsel also asserts that the evidence is insufficient to support Defendant's conviction of molestation of S.B., Count III, in that: the state failed to prove that Defendant was the person referred to by S.B. in her Gingerbread House interview as the person involved; the state failed to prove that the acts occurred in Louisiana; the state did not establish that the acts of "pinching and squeezing" as described by S.B. constitute lewd and lascivious acts; and S.B.'s testimony has so many internal contradictions that no rational fact finder could reasonably rely on her testimony to find Defendant guilty beyond a reasonable doubt.

*Id.* at 142; ROA.166-67. The Louisiana Second Circuit ruled against Terry:

> While there was some testimony by S.B. that she referred to both her biological father, J.B., and Defendant as "Dad," she sufficiently identified Defendant to overcome any alleged confusion on the part of the young victim, who stated that Defendant was the person who did those acts alleged by her.

> During her interviews at Gingerbread House, S.B. described how Defendant touched and pinched on her vagina. The victim referred to Defendant as "Terry Terry Terry," and it was revealed during the trial that she may have called others by the same name; however, S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately. Specifically, S.B. stated that the inappropriate acts occurred while she was living with Defendant.

*Id.* at 144; ROA.171-72. The Louisiana Second Circuit failed to address Terry's argument that the acts of "pinching and squeezing" as described by S.B. failed to constitute lewd and lascivious acts.

Terry applied for a writ of certiorari and/or review of his conviction to the Supreme Court of Louisiana and included the same sufficiency claim on count three, ROA.1956-60, which was denied on June 28, 2013. *State v. Terry*, 2012-2759 (La. 6/28/13), 118 So. 3d 1096; ROA.219.

Terry next filed an application for post-conviction relief ("PCR") in the First Judicial District Court and included the same sufficiency claim on count three, ROA.2072. The state district court denied Terry's PCR in a written opinion on August 12, 2016, which did not specifically address Terry's insufficiency claim on count three. ROA.322-26. Terry then filed an application for supervisory writ of review to Court of Appeal, Second Circuit, State of Louisiana from the denial of his PCR application which was denied on December 2, 2016. ROA.367. Terry then applied to the Supreme Court of Louisiana for a writ of certiorari from the denial of his PCR application, which was denied on May 25, 2018. *State ex rel. Terry v. State*, 2017-0237 (La. 5/25/18), 243 So. 3d 1060; ROA.406-07. Justice Hughes dissented and indicated he would grant the petition in part. *Id.*; ROA.408.

### B. Proceedings in federal court

On June 14, 2018, Terry, *pro se*, timely filed a petition for writ of habeas corpus in the district court under 28 U.S.C. § 2254 alleging that he was being held in the custody of the State of Louisiana in violation of the Constitution. ROA.7. The first issue raised by Terry was the sufficiency of the evidence to support his convictions, including count three. ROA.34-43. On June 2, 2021, the magistrate judge issued a report and recommendation that Terry's petition be denied but that he be granted a certificate of appealability as to the sufficiency of evidence as to count three. ROA.562-91.

The district court adopted the report and recommendation, denied Terry's petition, and granted him a certificate of appealability as to the sufficiency of evidence on count three. ROA.614. Terry filed a timely notice of appeal on October 11, 2021. ROA.618.

Terry, *pro se*, filed both an opening brief and a reply brief in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit then, *sue sponte*, appointed undersigned counsel to file a supplemental brief and participate in oral argument on behalf of Terry.

On October 31, 2023, the Fifth Circuit affirmed Terry's conviction. App. 001. The court held that the state court was not objectively unreasonable in rejecting Terry's sufficiency challenge.

## REASONS FOR GRANTING THE WRIT

### I. The state court unreasonably applied *Jackson* when it determined that evidence presented at trial was sufficient to sustain Terry's conviction on count three (molestation of victim S.B.) where the victim testified that it was her father, Jonathan, and not the Petitioner Terry who touched her and where the victim's description of the contact—painless pinching and squeezing—fails to meet the statutory definition of molestation

No rational jury could find that Terry L. Terry molested S.B. when S.B. identified someone other than Terry who touched her and S.B.'s description of the touching failed to amount to lewd and lascivious conduct under the Louisiana molestation statute. But the well-developed record in this case explains how Terry was convicted even though he did not molest S.B. The jury heard credible evidence that Terry had molested his own daughters decades prior and swept the unsupported allegation concerning S.B. into an *in globo* guilty verdict against Terry. But such a result offends due process and must be reversed because there was no evidence that a rational juror could have used to convict Terry of molesting S.B., and the state court's contrary decision was objectively unreasonable. This is the rare and extraordinary case where this Court should grant certiorari to correct an injustice and provide further guidance under *Jackson v. Virginia*, 443 U.S. 307 (1979) and habeas challenges to state court convictions.

#### A. Standard of review

A sufficiency of the evidence claim is evaluated under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), which stated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." *Id.* at 319. The *Jackson* court also said, "[t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

The Supreme Court has also said the following:

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. And second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

*Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (internal marks and citations omitted).

"Habeas relief under section 2254 on a claim of insufficient evidence is appropriate only if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *West v. Johnson*, 92 F.3d 1385, 1393 (5th Cir. 1996).

This Court must review the evidence in the light most favorable to the jury verdict. *United States v. Resio-Trejo*, 45 F.3d 907, 910 (5th Cir. 1995). Further, "it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. A jury is free to choose among reasonable constructions of the evidence." *United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (internal marks omitted).

To be sure, however, federal courts are well within their rights to grant petitions under 28 U.S.C. § 2254 when the state fails to introduce sufficient evidence at trial to support an element of the crime. *See e.g., Donahue v. Cain*, 231 F.3d 1000, 1005 (5th Cir. 2000) (granting habeas relief on a sufficiency of the evidence claim where the state failed to introduce any evidence at trial that the defendant knew the person he fired his gun at was a peace officer, a necessary element of attempted murder of a peace officer under Louisiana law).

### B. Applicable law

Under *Jackson*, federal courts must look to state law for "the substantive elements of the criminal offense," *Coleman*, 566 U.S. at 655. In 2008, molestation of a juvenile was defined as

> [T]he commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile.

LA REV. STAT. § 14:81.2 (2008). The elements of the crime of molestation of a juvenile under § 14:81.2 are:

(1) the accused was over the age of 17;
(2) the accused committed a lewd or lascivious act upon the person or in the presence of a child under the age of 17;
(3) the accused was more than two years older than the victim;
(4) the accused had the specific intent to arouse or gratify either the child's sexual desires or his or her own sexual desires; and
(5) the accused committed the lewd or lascivious act by use of force, violence, duress, menace, psychological intimidation, threat of

> great bodily harm or by the use of influence by virtue of a position of control or supervision over the juvenile.

LA REV. STAT. § 14:81.2; *State v. LeBlanc*, 506 So.2d 1197 (La.1987); *State v. Watson*, 39,362 (La.App.2d Cir.4/20/05), 900 So.2d 325; *State v. Elzie*, 37,920 (La.App.2d Cir.1/28/04), 865 So.2d 248, *writ denied*, 04–2289 (La.2/04/05), 893 So.2d 83.

For purposes of molestation of a juvenile, a "lewd or lascivious act" is one which tends to excite lust and to deprave morals with respect to sexual relations and which is obscene, indecent and related to sexual impurity or incontinence carried on in a wanton manner. *State v. Redfearn*, 44,709 (La.App.2d Cir.9/23/09), 22 So.3d 1078, *writ denied*, 09–2206 (La.4/09/10), 31 So.3d 381. To be lewd and lascivious the act also must be "with the intention of arousing or gratifying the sexual desires." *State v. Holstead*, 354 So. 2d 493, 497 (La. 1977). The determination of whether an act is lewd or lascivious, for purposes of the statute defining indecent behavior with a juvenile, depends upon the time, the place and all of the circumstances surrounding its commission, including the actual or implied intention of the actor. *State v. Houston*, 40,642 (La.App.2d Cir.3/10/06), 925 So.2d 690, *writ denied*, 06–0796 (La.10/13/06), 939 So.2d 373, *appeal after new sentencing hearing*, 41,743 (La.App.2d Cir.3/28/07), 954 So.2d 311.

### C. Argument

#### 1. No rational jury could find that the Petitioner—Appellant Terry was the person who touched S.B.

No rational jury could find that S.B. identified the Petitioner—Appellant Terry as the person who squeezed or pinched her butt or vagina. The state court's decision

to the contrary was "objectively unreasonable." *Coleman*, 566 U.S. at 651. The state court's conclusion is objectively unreasonable because it was based on findings that were unsupported in the record, namely that any confusion by S.B. was overcome when "[S.B.] stated that Defendant was the person who did those acts alleged by her" and that "S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately." ROA.171-72. The state court's decision was objectively unreasonable and must be reversed as to count three.

#### a. There is no direct evidence from which a rational jury could conclude that S.B. identified the Petitioner—Appellant Terry as the person who touched her

The state court ruling was objectively unreasonable because it was based on the unsupported conclusion that that any confusion by S.B. was overcome when "[S.B.] stated that Defendant was the person who did those acts alleged by her" and that "S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately," ROA.171-72. While the state court identified the correct legal standard under *Jackson*, the state court "unreasonably applie[d] that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The application of federal law is unreasonable where "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

S.B., whose testimony only spans 19 pages, never stated that the Petitioner—Appellant Terry was the person who touched her. She says at various times that "Jonathan" touched her. *See* ROA.3217-18, 3223, 3225. Jonathan is her biological father. She also says that her "daddy" was who touched her. *See* ROA.2580-81, 2584, 2588. Jonathan, not the Petitioner—Appellant, is S.B.'s daddy.

The *only* connection in the record to the Petitioner—Appellant by S.B. is her use of the nickname "Terry Terry Terry." *See* ROA.2572-73, 2580-81, 2587-91, 3217-18, 3222-23, 3225. But no rational trier of fact could conclude that S.B.'s use of the nickname "Terry Terry Terry" identified the Petitioner—Appellant because S.B. used that nickname for several other people, including her biological father, Jonathan. *See* ROA.2572, 2580-81, 2588-89, 3217-18, 3222-23, 3225. Even viewing the evidence in the light most favorable to the jury verdict, as this Court must, *Resio-Trejo*, 45 F.3d at 910, there is no rational dispute between who S.B. was talking about when she talked about who touched her. She was talking about her biological father Jonathan. This was not a case where there were competing witnesses with competing theories and the jury was free to decide which witness to believe. *Compare with Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam) (finding evidence was sufficient to support jury's conclusion that child died from shaken baby syndrome because the jury was presented with competing views of how the victim died and that the State's experts opined that the hemorrhaging of the victim's brain and the bruise and abrasion on the lower back was consistent with, and best explained by, death from sudden tearing of the brainstem caused by shaking.)

S.B. told the jury that her daddy's name was "*Jonathan* Terry Terry Terry," ROA.3217-18 (emphasis added). S.B. then testified that when she said "Terry Terry Terry" was her daddy on the Gingerbread video, she was talking about Jonathan (her biological father):

**Counsel:** And when you said Terry Terry Terry was your father, you meant Jonathan.
**S.B.:** Yes, sir.

ROA.3223. To be even more clear, S.B. again identified her biological father Jonathan as the "Terry, Terry, Terry" who touched her:

**Counsel:** You said in your video that Terry Terry Terry was doing certain things to you. Do you remember saying that in your videos?
**S.B.:** Yes.
**Counsel:** Now, who do you mean when you said "Terry Terry Terry"?
**S.B.:** Jonathan.
**Counsel:** That's your daddy.
**S.B.:** Yeah.

ROA.3225. Even giving all deference to the jury, there is simply no rational basis to conclude that S.B. identified the Petitioner—Appellant Terry as the person who touched her. S.B. repeatedly told the jury that her daddy was Jonathan, whom she called "Terry Terry Terry," and that was who touched her. Shockingly, at no point did S.B. make in in-court identification of the Petitioner—Appellant as the person who touched her, a strategy universally employed by prosecutors to identify perpetrators. There was simply no identification of the Petitioner—Appellant by S.B. whatsoever to give any rational basis for the conviction on count three. Contrary to the state's argument, the jury's credibility determination of S.B. is not being challenged by the Petitioner—Appellant Terry. S.B. simply did not identify Terry.

The state court's finding that "[S.B.] stated that Defendant was the person who did those acts alleged by her" and that "S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately," ROA.171-72, is objectively unreasonable because it is unsupported by sufficient evidence in the record. *See Canaan v. McBride*, 395 F.3d 376, 383 (7th Cir. 2005) (state court's finding that counsel advised petitioner of his right to testify was unreasonable as the finding was "flatly contradicted" by testimony of counsel); *Bui v. Haley*, 321 F.3d 1304, 1314-16 (11th Cir. 2003) (state court finding based on statements made at remand *Batson* hearing by attorney who had been seated with prosecutor during jury selection process was unreasonable given that attorney never claimed to have discussed prosecutor's reasons for strikes with him, and she never claimed to have discussed issue with him at all, beyond requesting his trial notes, which were never located); *Miller v. Dormire*, 310 F.3d 600, 603-04 (8th Cir. 2002) (state court's finding that the petitioner consented to the waiver of his right to a jury trial was unreasonable where the record was "devoid of any direct testimony from Miller regarding his consent to waive trial by jury" and it appeared that counsel failed to advise him of this right); *Gunn v. Ignacio*, 263 F.3d 965, 970–71 (9th Cir. 2001) (state court's finding that the "state further indicated that it would not oppose concurrent sentences" was unreasonable where federal court "searched with great care for any words in the sentencing hearing that support the determination" and could not find any).

The failure of the Petitioner—Appellant to be identified as the perpetrator in this case is similar to two cases where federal courts rejected a state court's application of *Jackson* where the prosecution failed to prove that the defendant was the perpetrator of the crime.

In the first case, the Sixth Circuit in *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008), held a state court ruling to be objectively unreasonable on grounds that the prosecution did not present sufficient evidence to support a prosecution for murder of a known drug dealer. In *Newman*, the prosecution presented evidence at trial that the petitioner planned to rob drug dealers for drugs or money; that the victim was a known drug dealer who kept drugs in his freezer; that the petitioner and the victim were known to engage in drug transactions in the past; that the victim's freezer was "open and empty" after he was killed; and that the petitioner had a motive for the killing because he had seen the victim "make a pass" at the petitioner's girlfriend. *Id.* at 794. Furthermore, the prosecution presented evidence supporting an inference that Newman had possessed and once purchased the murder weapon. *Id.* This evidence included forensic evidence and the fact that the petitioner's friend saw a gun similar to the murder weapon in the petitioner's home a few weeks prior to the murder. *Id.*

In analyzing the evidence under *Jackson*, the *Newman* court stated that even when "consider[ing] all of the evidence in the light most favorable to the prosecution, there remains reasonable doubt because we are limited by what inferences reason will allow us to draw." *Id.* at 797.

The *Newman* court reasoned that while there was "a wealth of information showing that [the petitioner] owned the gun," "evidence placing [the petitioner] at the scene" was "conspicuously absent." *Id.* at 797. It pointed to the fact that there was no eyewitness testimony and the police did not recover any fingerprints from the crime scene. *Id.* The *Newman* court stated that "[w]ithout additional evidence placing [him] at the scene of the crime, there is only a reasonable speculation that [the petitioner] himself was present." *Id.* It concluded that "where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard." *Id.* Accordingly, the *Newman* court declared the state court ruling an unreasonable application of clearly established federal law. *Id.*

In *Newman*, the Sixth Circuit ruled a state court decision to be objectively unreasonable under *Jackson* on facts *significantly* more probative of a petitioner's guilt than what we have here. For example, Terry, like the petitioner in *Newman*, was not linked to the alleged crime by forensic evidence or eyewitness testimony; however, unlike the petitioner in *Newman* for which there was substantial evidence of his intent and motive to rob and murder the victim, there was absolutely no evidence introduced to bolster the state's claim that Terry was the person identified by S.B. That S.B. described conduct that might have occurred at Terry's residence is even less probative than the evidence rejected in *Newman* that the petitioner might have been present at the scene of that crime.

In the second case, the First Circuit in *O'Laughlin v. O'Brien*, 568 F.3d 287 (1st Cir. 2009), held a state court ruling to be objectively unreasonable on grounds that the prosecution did not present sufficient evidence to support a prosecution for the attempted murder of a resident of an apartment where the defendant worked as a maintenance man. In *O'Laughlin*, the prosecution presented evidence that the petitioner made several comments about his attraction to the victim, possessed a master key to her apartment, and was a drug addict who was depleted of his drugs and cash the night of the attack. *Id.* at 290-91. Responding officers found the petitioner near the victim's apartment wearing only boxers in the freezing cold, found no sign of forced entry in the victim's apartment, and found the victim severely beaten. *Id.* at 292. A baseball bat was subsequently found that belonged to the petitioner and was consistent with the type of object that could have caused the victim's injuries. *Id.* at 294. Finally, the petitioner refused to allow investigators to swab blood found in his apartment and by the time a warrant was received, the petitioner had cleaned the blood. *Id.* at 293.

Based on these facts, the *O'Laughlin* court concluded:

> We acknowledge the many strands of circumstantial evidence the prosecution has presented in this case; however, when viewing this evidence in its totality, as we must do on habeas review, that evidence is far from sufficient to establish O'Laughlin's guilt under *Jackson*. Based on the record before us and drawing all reasonable inferences in favor of the prosecution, we hold that it would be overly speculative to conclude O'Laughlin to be the assailant beyond a reasonable doubt. Accordingly, we conclude that the [state court]'s decision to uphold O'Laughlin's conviction was objectively unreasonable.

*Id.* at 308. The evidence against Terry with respect to the molestation of S.B. is significantly less compelling than the evidence against the petitioner in *O'Laughlin*. Just as there was no evidence other than speculation directly linking O'Laughlin to the violent assault, there is no evidence other than speculation based upon his past directly linking Terry to the allegations against S.B.

Both *Newman* and *O'Laughlin* are examples of federal courts rejecting a state court's application of *Jackson* where the prosecution failed to prove that the defendant was the perpetrator of the crime. This Court should follow suit.

Finally, the testimony of Dr. Springer is irrelevant to the sufficiency of evidence as to count three. Dr. Springer's testimony provided no evidence or opinion as to *the identity* of the person S.B. claimed touched her. Viewing Dr. Springer's testimony in a light most favorable to the verdict, the jury could conclude that S.B. was in fact sexually abused and/or digitally penetrated but would still lack any rational basis, in evidence, to conclude that the Petitioner—Appellant was the person who committed the act.

The state court's conclusion that "[S.B.] stated that Defendant was the person who did those acts alleged by her" and that "S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately," ROA.171-72, is objectively unreasonable. "Speculation and conjecture cannot take the place of reasonable inferences and evidence—whether direct or circumstantial." *Juan H. v. Allen*, 408 F.3d 1262, 1279

(9th Cir. 2005), *amended*, No. 04-15562, 2005 WL 1653617 (9th Cir. July 8, 2005) (citing to *Jackson*, 443 U.S. at 326).

This Court must grant relief "if the evidence of innocence, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1165 (9th Cir. 2010) (en banc) (citing *Jackson*, 443 U.S. at 319). An essential element of the offense of molestation is that the accused be the one who committed the lewd or lascivious act. LA REV. STAT. § 14:81.2; *LeBlanc*, 506 So.2d 1197. Because no rational trier of fact could find that S.B. identified the Petitioner—Appellant Terry as the person who touched her, count three must be vacated.

**b. There is no circumstantial evidence from which a rational jury could conclude that S.B. identified the Petitioner—Appellant Terry as the person who touched her**

Without any evidence of a direct identification of the Petitioner—Appellant Terry, this Court may look to the circumstantial evidence to determine if there is still a rational basis for a jury to find that Terry was the person who touched S.B. *Watson*, 900 So. 2d at 330 (The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence.). Here the circumstantial evidence on count three overwhelming weighed against conviction. *Compare with Newman*, 543 F.3d 793 (discussed above) (finding substantial circumstantial evidence of the defendant's guilt but still reversing conviction on habeas review under § 2254).

Terry always denied the allegation that he molested S.B., ROA.3324-25, 3366, 3582, 3608, unlike counts one and two for which he had previously confessed.

Terry's wife Jennifer explained that she did not work so she was always home with the children, including S.B. ROA.3455. Jennifer was the one who bathed and cared for the children each day. ROA.3458. Jennifer testified that nobody ever went into S.B.'s room and nobody could have molested her in her bed or the bathroom without Jennifer knowing. ROA.3455. Another member of Terry's household, Donna Terry Brandy, likewise testified that they were around the house and never saw Terry be inappropriate with S.B. and that Terry worked long hours and was rarely even at the home. ROA.3493, 3495-96, 3501.

S.B.'s biological parents both testified that they did not believe the allegations, that their daughter was telling kid stories, and that Petitioner—Appellant's wife Jennifer was always with S.B. ROA.3240, 3242, 3264, 3307. Finally, Terry's previous girlfriend and her minor daughter testified that they lived with him for five years and he never did anything inappropriate. ROA.3538, 3542-43, 3545, 3548. There is no circumstantial evidence that a reasonably jury could view supporting that Terry was the person who touched S.B.

**2. Alternatively, no rational jury could find that the described painless squeezing or pinching S.B.'s butt and vagina was a "lewd or lascivious" act**

The state court was also objectively unreasonable when it upheld Terry's conviction under count three with respect to the "lewd and lascivious" element. In affirming count three, the state acknowledged Terry's "lewd and lascivious"

argument, ROA.166-67, but failed to address the argument in its ruling. *See* ROA.171-72. As correctly acknowledged by the report and recommendation below, "Section 2254(d) applies even where there has been a summary denial." *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011).

No rational jury could find that S.B. description of the alleged molestation would satisfy a "lewd and lascivious act" under LA REV. STAT. § 14:81.2 (2008). Under Louisiana law, to constitute lewd and lascivious act, the act must "excite lust and to deprave morals with respect to sexual relations and which is obscene, indecent and related to sexual impurity must be "obscene, indecent and related to sexual impurity." *Redfearn*, 22 So.3d 1078. And the act must be done "with the intention of arousing or gratifying the sexual desires." *Holstead*, 354 So. 2d at 497.

The jury heard S.B., in the Gingerbread video, say that nobody had touched her vagina before. ROA.2580. S.B. then said that her daddy had touched her butt before with his hand under her clothes and that he had pinched and squeezed. ROA.2580-81. The interviewer then focused S.B.'s attention on the vagina on the diagram and asked, "what about this part of the body" to which S.B. says, "he squeezes me too" and "he squeezed me and pinches me right there." ROA.2584. The interviewer asked S.B., "when your dad squeezes you or pinches you on your vagina, does it hurt" to which S.B. says no. ROA.2584. That is the entirety of the evidence presented of a lewd and lascivious act.

No rational jury could conclude that a relative pinching or squeezing a child's behind is lewd or lascivious conduct. The jury heard S.B. say that her dad touched,

squeezed, and pinched her "butt" under her clothes. But there is no reasonable view of that statement that could show that it would "excite lust and to deprave morals with respect to sexual relations" and was "obscene, indecent and related to sexual impurity." *Redfearn*, 22 So.3d 1078. Indeed, squeezing and pinching the butt of a child is not lewd and lascivious conduct—but rather amounts to normal parent child contact. There is nothing "obscene" about pinching or squeezing a child's rear end.

Likewise, no rational juror could find that S.B.'s statement that her daddy squeezed and pinched the area around her vagina would amount to lewd and lascivious conduct. Every touching of the outside of a child's vagina is not lewd and lascivious conduct. Indeed, adults routinely touch the vaginal area of their child to wipe after they use the restroom or to bath or clean the area, or even incidentally during play time. The fact that adults must touch children in potentially sexual areas is precisely why the state must *also* prove the contact was "obscene," "indecent," would "excite lust," and was done "with the intention of arousing or gratifying the sexual desires." *Redfearn*, 22 So.3d 1078; *Holstead*, 354 So. 2d at 497.

First, there was no evidence introduced at trial to support that the contact with S.B. vagina was obscene or indecent. S.B. told the interviewer that the contact was not painful. ROA.2584. She described the contact as painless squeezing and pinching, which is neither obscene nor indecent. S.B. did not describe any penetration. A single statement that a parent pinched and squeezed a child's vaginal area, without more, cannot be reasonably viewed by a jury as lewd and lascivious conduct.

Second, there was absolutely no evidence, direct or circumstantial, that S.B.'s daddy touched her with the intent to arouse or gratify his own sexual desires. There is no evidence that her daddy was nude, aroused, or received any sexual pleasure from the contact. *Compare with Redfearn*, 22 So. 3d 1078, 1087 (Finding a "lewd or lascivious act" when defendant, with an erect penis, entered the bed with his daughter and sons, all of whom were naked, and attempted to masturbate and penetrate one of the children.); *State v. Lirette*, 11-1167 (La. App. 5 Cir. 6/28/12), 102 So. 3d 801, 812, *writ denied*, 2012-1694 (La. 2/22/13), 108 So. 3d 763 (Finding a "lewd and lascivious act" when the defendant took his clothes off, entered the room of each victim, touched the victim's vagina under the covers, and told the victim to be cool and not say anything when the victim objected); *State v. Domangue*, 12-760 (La. App. 5 Cir. 5/23/13), 119 So. 3d 690, 696 (Finding a "lewd and lascivious act" when the defendant touched the victim's "private part" on more than five occasions and made the victim touch and "bounce" on his penis.).

The state's reliance on *State v. Wilson*, 50,418 (La. App. 2 Cir. 4/6/16), 189 So. 3d 513 *writ denied*, 2016-0793 (La. 4/13/17), 218 So. 3d 629, to support its position that S.B.'s described conduct is lewd and lascivious is without support. In *Wilson*, the eleven-year-old victim told her doctor that her grandfather "had placed his fingers in her vagina." *Id.* at 517. Other evidence showed that the victim's parents had been using a topical ointment to combat rashes on the victim's vaginal area for many years but had informed the defendant that he was not allowed to apply the ointment, a request he ignored. *Id.* at 518. The victim testified at trial that the abuse occurred

multiple times and that the most recent time occurred in the defendant's shed where he made the victim lay on a table while he "put his finger in there" (referring to her vagina) and that it hurt and she started crying. *Id.* at 519.

The victim in *Wilson* also described another incident where the defendant sat on a recliner with the victim and:

> [P]ut his finger in the hole ... and just, you know, went back and forth sometimes ... And sometimes, just stick it in there. And when he did that, sometime, he'd like move, like he'd be on top ... And he'd like move ... and I could—you know, I could feel his parts—on my part.

*Id.* (brackets omitted). The appeals court affirmed Wilson's conviction, because painfully inserting a finger in an eleven-year-old's vagina and moving it around while making the child feel the defendant's parts is lewd a lascivious conduct because it is unquestionably obscene and indecent. But this case has no evidence similar to *Wilson*. S.B. did not describe any painful touching or any penetration, like that described by the victim in *Wilson*. S.B. also did not describe any sort of arousal, exposure, or physical contact with her perpetrator, unlike the victim in *Wilson* who described the defendant getting on top of her so that she could feel his "parts."

No reasonable jury could find that S.B.'s daddy sought sexual gratification through this innocent conduct. "Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence." *Newman*, 543 F.3d at 796. Here, it is clear that the jury took evidence of Terry's guilt on counts one and two and used that to unreasonably speculate that Terry must be guilty of count three. The state court's holding, without

providing any analysis or discussion, that S.B.'s described conduct amounted to lewd and lascivious conduct was objectively unreasonable and must be reversed.

This is the rare and exceptional case where this Court should grant certiorari to correct an injustice and provide further guidance on the *Jackson* standard in habeas review of state convictions.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this January 25, 2024,

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